

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ROCK HILL DIVISION**

CASE NUMBER: 0:09-cv-02980-JFA

Builders Mutual Insurance Company,

Plaintiff,
v.

S&S Services of Rock Hill, Inc., Mac Ellerbe
and Debbie Ellerbe,

Defendants.

**DECLARATORY JUDGMENT
COMPLAINT
(Non-Jury)**

The Plaintiff above named, complaining of the Defendants herein, would respectfully show as follows:

PARTIES AND JURISDICTION

1) Builders Mutual Insurance Company (hereinafter “Builders Mutual”) is an insurance company organized and existing pursuant to the laws of the State of North Carolina, with its principal place of business in North Carolina. Builders Mutual is authorized to write insurance and does write insurance in the State of South Carolina.

2) S&S Services of Rock Hill, Inc. (hereinafter “S&S”), is, upon information and belief, a corporation organized and existing pursuant to the laws of the State of South Carolina with its principal place of business in York County, South Carolina.

3) Mac Ellerbe and Debbie Ellerbe are citizens and residents of York County, South Carolina.

4) The amount in controversy exceeds Seventy Five Thousand and 00/100 (\$75,000.00) Dollars.

5) There is, therefore, complete diversity and the amount in controversy exceeds the jurisdiction minimum. This court has jurisdiction based on 28 U.S.C. § 1332.

6) This court has the authority under 28 U.S.C. § 2201 and Rule 57, Fed. R. Civ. P., to adjudicate the rights and legal relations of the parties based on the insurance contract between Builders Mutual and S&S.

7) Mac and Debbie Ellerbe are not insureds under the Builders Mutual insurance policy, which is described below. However, they are named as Defendants in this action because of interests they have which may be affected by the outcome.

FACTS

8) Mac and Debbie Ellerbe are the owners of a home, which is located in York County, South Carolina.

9) Upon information and belief, Mac and Debbie Ellerbe retained S&S to demolish a portion of their home and construct an addition in place of it. Upon information and belief, S&S did not employ any sub-contractors to perform any of the work which it was contracted to provide to the Ellerbes.

10) During the construction of the addition to the home, on or about July 6, 2009, a leak occurred at the plumbing supply line under the sink in the portion of the construction that was to be the master bedroom, which allowed water to flow into portions of the construction.

11) Upon information and belief, the leak occurred when the supply line became disconnected from a compression fitting. The supply line was installed and attached by S&S.

12) The damage caused by the water which was released into the construction was confined to the work which had been and was continuing to be constructed by S&S.

13) No part of the existing home, which was owned by the Ellerbes, suffered any damage due to the water leak.

14) Builders Mutual provided a commercial general liability insurance policy to S&S Services of Rock Hill, Inc. as the named insured (hereinafter “the policy”). The policy is

identified by policy number CPP 0027829 02. It was in effect beginning on June 1, 2009 and remained in effect at all times relevant to this action.

15) The general aggregate liability limit for the policy is \$2 Million Dollars. The “each occurrence” limit is \$1 Million Dollars. All the terms, conditions, exclusions, and endorsements of the policy are incorporated herein by reference. A copy of the policy is attached hereto as Exhibit “A”.

16) S&S has made a claim against the policy and has asserted and continues to assert that Builders Mutual is liable for damages caused by the water leak at the Ellerbe residence.

THE POLICY

17) The Builders Mutual policy contains the following terms which are relevant to the claims made by the Defendants:

SECTION I – COVERAGES

COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies. We will have the right and duty to defend the insured against any “suit” seeking those damages. However, we will have no duty to defend the insured against any “suit” seeking damages for “bodily injury” or “property damage” to which this insurance does not apply. . . .*
- b. This insurance applies to “bodily injury” and “property damage” only if:*
 - (1) The “bodily injury” or “property damage” is caused by an “occurrence” that takes place in the “coverage territory”;*
 - (2) The “bodily injury” or “property damage” occurs during the policy period; and*
 - (3) Prior to the policy period, no insured . . . knew that the “bodily injury” or “property damage” had occurred, in whole or in part. . . .*

* * *

2. Exclusions

This insurance does not apply to:

* * *

j. Damage to Property

“Property damage” to:

(5) That particular of real property on which you or any contractors or sub-contractors working directly or indirectly on your behalf or performing operations, if these “property damage” arises out of those operations.”

(6) That particular part of any property that must be restored, repaired, or replaced because “your work” was incorrectly performed on it.”

FOR A FIRST DECLARATION

18) Builders Mutual repeats and re-alleges each and every one of the proceeding paragraphs as if set forth verbatim herein.

19) The Builders Mutual policy contains an exclusion providing that the coverage does not apply to “property damage” to:...(5) that particular of real property on which you or any contractors or sub-contractors working directly or indirectly on your behalf or performing operations, if these “property damage” arises out of those operations.”

20) Upon information and belief, all damage to the Ellerbe residence arising from the plumbing leak was confined to the addition, which was being constructed by S&S at the time of the damage.

21) Therefore, Builders Mutual is entitled to a declaration that the policy does not provide coverage for any claim arising out of the damage to the Ellerbe residence which occurred on or about July 6, 2009.

FOR A SECOND DECLARATION

22) Builders Mutual repeats and re-alleges each and every one of the proceeding paragraphs as if set forth verbatim herein.

23) The Builders Mutual policy contains an exclusion providing that the coverage does not apply to “property damage” to:...(6) that particular part of any property that must be restored, repaired, or replaced because “your work” was incorrectly performed on it.”

24) Upon information and belief, all the damage to the property is the result of S&S’s work which was incorrectly performed, therefore, causing parts of the end progress construction of the Ellerbe residence to need restoration, repair, or replacement.

25) Therefore, Builders Mutual is entitled to a declaration that the policy does not provide coverage for any claim arising out of the damage to the Ellerbe residence which occurred on or about July 6, 2009.

WHEREFORE, Builders Mutual prays that the court inquire into these matters and make the above request of declarations, award the costs and attorneys fees associated with bringing this action, and provide Builders Mutual with such other and further releases as the court deems just and proper.

MURPHY & GRANTLAND, P.A.

s/Adam J. Neil, Esquire
Adam J. Neil, Esquire (Federal ID #7857)
4406-B Forest Drive
PO Box 6648
Columbia, South Carolina 29260
(803) 782-4100
**Attorneys for Builders Mutual Insurance
Company**

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